IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JAIPUR BENCH

JUDGMENT

Dharam Pal & Others Vs. State of Raj.
(D.B. Criminal Appeal No.470/2001)

D. B. Criminal Appeal under Sec.374 (2) Cr.P.C. against the judgment dated 26-7-2001 in Sessions Case No.35/2001 (76/93) passed by Shri Gopesh Chandra Dixti, RHJS, Additional Sessions Judge (Fast Track) Jhunjhunu.

Date of Judgment: July 02, 2007.

PRESENT

HON'BLE MR. JUSTICE SHIV KUMAR SHARMA
HON'BLE MR. JUSTICE R.S.CHAUHAN

Mr. Suresh Sahni] for the appellants.
Mr. R.M. Sharma]

Mr. B.K. Sharma, Public Prosecutor for the State.

BY THE COURT: (PER HON'BLE Shiv Kumar Sharma,J.)

In short the prosecution story is that on the fateful night the deceased and other members of the complainant party armed with deadly weapons visited the house of accused party. Free fight ensued and both the parties sustained injuries on the vital parts of the bodies. Accused Dharam Pal and Ram Niwas (appellants herein) were charge sheeted for having committed murder of Balbeer. At the trial another accused Mahipal (third appellant) was also implicated. Learned Trial Judge found three appellants guilty and convicted and sentenced them vide judgment dated July 26, 2001

as under:-

Dharam Pal:
U/s.302 IPC:
To suffer imprisonment for life and fine of Rs.100/-, in default to further suffer simple imprisonment for three months.

U/s.307/34 IPC:
To suffer rigorous imprisonment for seven years and fine of Rs.100/-, in default to further suffer simple imprisonment for three months.

Ram Niwas and Mahipal:
U/s.302/34 IPC:
Both to suffer imprisonment for life and fine of Rs.100/-, in default to further suffer simple imprisonment for three months.

U/s.307/34 IPC:
Both to suffer rigorous imprisonment for seven years and fine of Rs.100/-, in default to further suffer simple imprisonment for three months.

The substantive sentences were ordered to run concurrently.

2. On March 8, 1993 Baldev Singh ASI of Police Station Nawalgarh received telephonic message in regard to the incident occurred in the field of one Ram Kumar. Baldev Singh rushed to the place of incident and found Budha Ram, Mahaveer, Ranveer and Balbeer lying in an injured condition. They were removed to the hospital where Balbeer was declared dead. A report (Ex.P-1) thereafter was lodged by Baldev Singh and investigation commenced. On completion of investigation charge sheet was filed against Dharam Pal and Ram Niwas. In due course the case came up for trial before the learned Additional Sessions Judge (Fast Track) Jhunjhunu. Charges under sections 302, 302/34, 307 and 307/34 IPC were framed against Dharam Pal and Ram Niwas, who denied the charges and claimed

trial. The prosecution in support of its case examined as may as 15 witnesses. At the trial cognizance was also taken against Mahipal. In the explanation under Sec.313 Cr.P.C., the appellants claimed innocence. Ram Niwas in his explanation stated that Bhuda Ram, Ranveer, Mahaveer and Balveer came to his house and caused injuries on his person. Dharam Pal and Radha Devi were also beaten up. Radha Devi lodged the report of the incident at the Police Station. On hearing final submissions learned trial Judge convicted and sentenced the appellants as indicated herein above.

3. We have heard learned counsel for the appellants and learned Public Prosecutor and with their assistance scanned the material on record.

4. Evidently prior to the death the injuries sustained by Balbeer were examined vide injury report (Ex.P-19), that reads thus:-

> 1. Incised wound 1½ inch x 1inch x 1inch at skin of forehead 2 inch above from right eye brow.
> 2. Multiple Abrasions over back of chest
> No.1, 4 inch x 2 inch, 2, 5 inch x 1½ inch, 3, 6 inch x 3 inch
> 3. Multiple Abrasions at skin of lumbosecral region
> No.1, 3½ inch x 2 inch, 2, 4 inch x 1inch, 3, 3inch x 3 inch, 4, 6 inch x 3 inch
> 4. Incised wound 3 inch x 1 inch x 1 inch over scalp its vertex in middle
> 5. Incised wound 3½ inch x 4 inch x 2 inch over scalp its vertex.

After performing autopsy on the dead body Dr. Ram Chandra (Pw.11) opined that the cause of death was shock due to extensive and multiple injuries to head and fracture.

5. Ranveer (Pw.6), Mahaveer (Pw.9) and Budha Ram (Pw.7) also received incised wounds in the incident and the injuries received by them

were examined vide injury reports Ex.P-16, Ex.P-17 and Ex.P-18. These witnesses in their cross examination admitted that they had gone to the house of appellants on the date of incident. Mahaveer (Pw.9) in his examination in chief deposed thus:-

> "धर्मपाल के खेत में उसके घर पहुंचे ... वहां पर रणवीर चौक मे पडा हुआ था और बलवीर बाहर पडा हुआ था। चौक घर का ही था।"

Budha Ram (Pw.7) in his cross examination stated as under:-

> "हमारा दिन खोटा था और शराब पीने से झगडा हुआ"

6. At this juncture it may also be noticed that in the same incident appellants Ram Niwas and Dharam Pal also received injuries. Injuries received by Ram Niwas were incorporated in injury report (Ex.D-5) as under:-

> 1. Incised wound 2½ inch x 1 inch x ½ inch over scalp its vertex
> 2. Incised wound 1½ inch x 2 inch x ½ inch over scalp its vertex

Injury report of appellant Dharam Pal (Ex.D-6) reads thus:-

> 1. Lacerated wound 5cm x ½ cm x ½ cm at skin over dorsal surface of left palm
> 2. Abrasion 3cm x 2cm anterior surface of left ankle joint
> 3. Lacerated wound 3cm x 1½ cm x at skin over lateral surface of right leg great toe

7. Further scrutiny of record strengthen this fact that the incident

occurred in the house of appellants and a cross case was registered on the report of Radha Devi (aunt of appellants). This fact was admitted by Bhagwan Singh IO (Pw.13) in his cross examination:-

> "यह सही है कि घटना स्थल ही मुलजिम पार्टी के घर की जगह है जो मुलजिमान पार्टी वहां बसी है।... मजरूबान की तबीयत खराब होने के कारण उनके बयान लेट लिये गये। इस बारे में डाक्टर से प्रमाण पत्र नहीं लिया था कि ये बयान देने की हालत में नहीं है। ... पर्चा बयान प्रदर्श डी-8 श्रीमती राधा का बयान बलदेव सिंह ने लेकर मेरे समक्ष पेश किया था जिस पर कार्यवाही पुलिस दर्ज कर मैने अपने साईन ए से बी किये थे। और इसके आधार पर मैंने आरोप अं0 धा0 447ए 323 भा0दं0सं0 के अन्तर्गत ऎफ आई आर प्रदर्श पी-9 दर्ज की जिस पर ए से बी मेरे साईन हैं! ... ये मुझे ध्यान नहीं है कि मुलजिमान के शरीर पर आई चोटों का मुआयना मेरे द्वारा कराया गया हो।"

8. Having closely scrutinised the testimony of injured eye witnesses Ranveer (Pw.6), Mahaveer (Pw.9) and Budha Ram (Pw.7) we noticed following fact situation:-

(i) There was no enmity between the appellants and the deceased and the occurrence was a sudden affair.

(ii) Something which has not been completely brought on record might have sparked off the incident.

(iii) The members of complainant armed with the weapons had gone to the house of appellants in the late hours of night where the complainant party and the accused party fought freely.

(iv) Cross case was registered against the complainant party on the report of injured Radha Devi (the aunt of appellants).

(v) The injuries sustained by appellants Ram Niwas and Dharam Pal were not explained by the prosecution witnesses.

9. Their Lordships of Supreme Court in Subramani Vs. State of

T.N. (2002)7 SCC 210, in regard to non explanation of injuries sustained by the accused indicated as under:-

> "The appellants suffered injuries on vital parts of the body, even though simple but the prosecution failed to give any explanation for such injuries. The prosecution feigned ignorance about the injuries suffered by the appellants. It is not possible to accept the submission that the injuries being simple, the prosecution was not obliged to give any explanation for the same. Having regard to the facts of the case the omission on the part of the prosecution to explain the injuries on the person of the accused may give rise to the inference that the prosecution is guilty of suppressing the genesis and the origin of the occurrence and had thus not presented the true version."

10. In Vajrapu Sambayya Naidu Vs. State of A.P. (2004)10 SCC 152, the Apex Court held that where the injuries sustained by the accused were not explained by the prosecution it probabilise the case of defence that the prosecution party was the aggressor.

11. In Puran Vs. State of Rajasthan (AIR 1976 SC 912) it was indicated that where sudden mutual fight ensued between the parties, there is no question of invoking the aid of Section 149 IPC for the purpose of imposing constructive criminal liability. The accused can be convicted only for the injuries caused by him by his individual acts.

12. Common intention within the meaning of Section 34 IPC implies a pre-arranged plan and to convict the accused of an offence applying the section, it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan and the inference of common intent should never be reached unless it is necessary inference deducible from the circumstances of the case.

13. In Jai Bhagwan Vs. State of Haryana (1999)3 SCC 102, wherein their Lordships of Supreme Court indicated that to apply section 34 IPC apart from the fact there should be two or more accused, two factors must be established, (i) common intention and (ii) participation of the accused in the commission of an offence. If a common intention is proved but no overt act is attributed to the individual accused, Section 34 will be attracted as essentially it involves vicarious liability but if participation of the accused in the crime is proved and a common intention is absent, Section 34 cannot be invoked. In every case, it is not possible to have direct evidence of a common intention. It has to be inferred from the facts and circumstances of each case.

14. In the case on hand where the incident occurred at the time when Balbeer (deceased) had gone armed to the house of appellant Dharam Pal and while both were consuming liquor something sparked off the incident resulting the death of Balbeer, appellant Dharam Pal could not be held guilty under section 302 IPC. The injuries were sustained by the deceased in the course of sudden and free fight. Appellant Dharam Pal, who also sustained injuries, could not be said to have acted in cruel or unusual manner and his case clearly falls within Exception 4 of Section 300 IPC.

15. It is difficult to infer from the facts and circumstances of the case that appellants did share common intention to kill Balbeer or to cause injuries to Ranveer, Mahaveer and Budha Ram. In our opinion, the prosecution is able to establish the charge under section 304 Part II against appellant Dharam Pal and appellants Ram Niwas and Mahipal are entitled to benefit of doubt.

16. For these reasons, we dispose of instant appeal in the following terms:-

(i) We allow the appeal of appellants Ram Niwas and Mahipal and acquit them of the charges under sections 302/34 and 307/34 IPC. These appellants are on bail, they need not surrender and their bail bonds stand discharged.

(ii) We partly allow the appeal of appellant Dharam Pal and instead of section 302 we convict him under section 304 part II IPC. Looking to the fact that the appellant has already undergone confinement for a period of more than six years and two months the ends of justice would be met in sentencing him to the period already undergone by him in confinement. We however acquit him of the charge under section 307/34 IPC. The appellant Dharam Pal, who is in jail, shall be set at liberty forthwith, if he is not required to be detained in any other case.

(iii) The impugned judgment of learned trial court stands modified as indicated above.

(R.S.Chauhan),J. (Shiv Kumar Sharma)J.

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